Appendix 1

IN THE MATTER OF THE WELFARE REFORM BILL (WRB)

A D V I C E

A. Introduction

1. I am asked to advise the Equality and Human Rights Commission ("EHRC") on matters relating to the Welfare Reform Bill ("WRB") and related reforms to Social Security Benefits set out in a series of public consultations, namely:
   - *Public Consultation, Disability Living Allowance Reform* (2010, DWP) Cm 7984.
   - *21st Century Welfare* (2010, DWP) Cm 7913.
   - *Universal Credit: Welfare That Works* (2010, DWP) Cm 7957.

2. I am specifically asked to advise on the question whether specific aspects of the Bill are compliant with the Equality Act 2010 and the Public Sector Equality Duties (and its predecessors in the legacy enactments, so far as is material), the Human Rights Act 1998, any international law obligations to which the United Kingdom is subject and whether there may be any other public law grounds for challenging the introduction of the Bill and/or certain elements of it. My advice is sought as a matter or urgency because the WRB was introduced into Parliament on 16th February 2011 and the first committee stages of the Bill were scheduled to start on 22nd March 2011 and are expected to continue until approximately 24th May 2011. The EHRC understand that the Government's aim is to have the Bill complete its passage through Parliament before commencement of the summer recess.

3. This advice is sought to assist the EHRC develop its strategy for influencing the contents of the Bill as it makes its way through Parliament and to assist the EHRC in determining whether it might take action under Part 1 of the Equality Act 2006 in respect of any illegalities that I identify in this Advice arising from the provisions of the WRB and the related documents.

B. Summary of Advice

4. In very short summary I advise that:

(a) The WRB and the formulation of the policies reflected in it were introduced without any EIAs;

(b) Notwithstanding the later EIAs, the policies reflected in the WRB have been inadequately equality impact assessed such that "due regard" has not been properly paid to the equality objectives enumerated in the equality duties because of three principal failures,

(i) A failure to collect the data necessary to determine impact, adequately or at all on certain groups;

(ii) A failure to impact assess against each of the enumerated objectives (to promote equality of opportunity and good relations between persons of different racial groups; to take steps to take account of disabled persons disabilities even where that involves treating disabled people more favourably than other persons etc);

(iii) A failure to conduct a cumulative assessment at least in respect of the main policy measures that are likely to impact separately and thus cumulatively on particular protected groups.

(c) The policies reflected in the WRB have not been adequately impact assessed in accordance with the DWP's Equality Scheme *("Department for Work and Pensions Race, Disability and Gender Equality Schemes 2008 – 2011"*) and own policies (including on the Public Sector Equality Duty).

(d) Because of these failures, *"due regard"* has not been had to the equality objectives enumerated in the Equality Duties.

(e) The policy of introducing the changes to welfare anticipated in the WRB, by effectively a legislative framework and broad permissive regulation making powers has not, so far as I can deduce, been impact assessed, though it impacts on the Government's ability to assess the ultimate impact of the measures anticipated in the WRB on the protected classes and to assess compliance with the Convention rights.

(f) The exceptions in the Equality Duties addressing proceedings in Parliament may present a difficulty, if legal action is to be pursued because the issues relate to the process of what will ultimately be primary legislation. However such a point has not so far been taken by the Government in analogous proceedings and there are good grounds for contending that the relevant exemptions should be read narrowly so as not to preclude a decision to introduce the WRB in the form it is in and without adequate impact assessments and *"due regard"* to the equality objectives. In my view, given what in my judgment is the intended limits of the exemption, a challenge (a) to

the failure to conduct EIAs before the introduction of the Bill and (b) a challenge to the adequacy of the EIAs that have been conducted are not precluded by the exemptions.

(g) If there is to be a challenge in judicial review (a) to the failure to conduct EIAs before the introduction of the Bill and (b) a challenge to the adequacy of the EIAs proceedings must be issued **very promptly. Any delay now is likely to seriously prejudice proceedings.**

(h) The s19, Human Rights Act 1998 (HRA) might be challengeable since the WRB is drafted in such broad terms with the detail to be implemented by regulations, it might be said that there is no proper basis for such a statement.

(i) It is difficult to determine whether the WRB is incompatible with the Convention rights because of the broad terms in which it has been drafted, but having regard to its terms and the policies behind it, it will arguably be incompatible in implementation with Articles 3, 8 and 14, HRA. The fact that there have been inadequate EIAs is such that justification for any *prima facie* violation will be difficult for the DWP to establish.

(j) The international law background will provide robust support for challenges based upon the HRA.

(k) There may be a basis for challenging the WRB and the equality impact assessments on the basis of a failure to consult but further instructions are required to advise more fully on this.

C. The Welfare Reform Bill (WRB)

5. As mentioned the WRB was introduced into Parliament on 16 February 2011. The main elements of the WRB, according to the DWP website, are:

- The introduction of the Universal Credit to provide a single streamlined benefit that will ensure work always pays
- A stronger approach to reducing fraud and error with tougher penalties for the most serious offences
- A new claim and commitment showing clearly what is expected of claimants while giving protection to those with the greatest needs
- Reforms to Disability Living Allowance, through the introduction of the Personal Independence Payment to meet the needs of disabled people today
- Creating a fairer approach to Housing Benefit to bring stability to the market and improve incentives to work

- Driving out abuse of the social fund system by giving greater power to local authorities
- Reforming employment and support allowance to make the benefit fairer and to ensure that help goes to those with the greatest need
- Changes to support a new system of child support which puts the interest of the child first.

Universal Credit

6. Part 1, WRB addresses the new *Universal Credit* payable to a single person or members of a couple jointly.[1] It will be calculated by reference to a standard allowance, an amount for responsibility for children or young persons, an amount for housing and amounts for other particular needs or circumstances.[2] Certain conditions of entitlement are set out in Part 1.[3] They include a requirement that a person *"has accepted a claimant commitment".*[4] Awards of universal credit are to be calculated by reference to a maximum amount (which will be the total of a standard allowance and any amounts referable to responsibility for children and young persons, housing costs and other particular needs or circumstances)[5] and the amounts to be deducted, comprising earned and unearned income.[6] As to *"other needs or circumstances",* the WRB makes provision for the making of regulations which are to specify, or provide for the determination or calculation of, any amount referable to the particular needs or circumstances of a claimant which are to be covered by such an element of the universal credit.[7] According to the WRB, the needs or circumstances prescribed may include the fact that a claimant has limited capability for work; the fact that a claimant has limited capability for work and work-related activity and the fact that a claimant has regular and substantial caring responsibilities for a severely disabled person.[8]

7. Chapter 2, Part 1, defines a *"claimant commitment"* as *"a record of a claimant's responsibilities in relation to an award of universal credit."*[9] Such a commitment is to be prepared by the Secretary of State and may be reviewed and updated as the

1 Clause 1.
2 Clause 1(3).
3 Clause 4 and 5.
4 Clause 4(1)(e).
5 Clause 8(2).
6 Clause 8(3).
7 Clause 12.
8 Ibid.
9 Clause 14(1).

Secretary of State thinks fit and may be in such form as the Secretary of State thinks fit.[10] A *"claimant commitment"* will include:

- a record of the requirements that the claimant must comply with or such of them as the Secretary of State considers it appropriate to include;
- any prescribed information; and
- any other information the Secretary of State considers it appropriate to include.[11]

8. As to what the requirements may be, these are described in Chapter 2 and these comprise *"work-related requirements"* which in turn comprise:

- a work-focussed interview requirement;
- a work preparation requirement;
- a work search requirement; and
- a work availability requirement.[12]

9. As to which work-related requirements may be imposed on a claimant, this will depend on which group the claimant falls into, the relevant groups comprising:

- no work-related requirements;
- work-focussed interview requirement only;
- work-focussed interview and work preparation requirements only; and
- all work-related requirements.[13]

10. A claimant will accept a *"claimant commitment"*, for the purposes of these provisions, if and only if he or she accepts the most up to date version of it in such a manner as may be prescribed.[14]

11. The work-related requirements which are to be the subject of the *"claimant commitments"* on which entitlement to benefit will depend are fairly self explanatory. However, in very short summary, the work-focussed interview requirement will require a claimant to participate in one or more work-focussed interviews which will be for purposes of and relating to work or work preparation; a work preparation requirement will include attending courses, improving personal presentation and the

---

10 Clause 14(2) – (3).
11 Clause 14(4).
12 Clause 13(1) – (2).
13 Clause 13(3).
14 Clause 14(5).

like for the purpose of making it more likely that the claimant will obtain paid work;[15] a work search requirement is a requirement that a claimant take reasonable action or particular specified action for the purpose of obtaining work or better paid work;[16] a work availability requirement is a requirement that a claimant be available for work, meaning able and willing immediately to take up paid work or better paid work.[17]

12. As to the claimant groups, the Secretary of State may not impose any work-related requirement on a claimant with limited capability for work and work-related activity; a claimant who has regular and substantial care and responsibilities for a severely disabled person; a claimant who is the responsible carer for a child under the age of 1 or a claimant of a prescribed description.[18] Provision may be made in the last case by reference to hours worked, earnings or income and the amount of universal credit payable.[19] As to whether a person is a *"responsible carer"* in relation to a child, such as a single person who is responsible for the child or where a member of a couple one of them is responsible for the child and that person has been nominated by the couple jointly as responsible for the child.[20] Claimants who may be subject to a work-focussed interview requirement only include those who are responsible carers for a child who is at least 1 and is under a prescribed age which may not be less than 3 and claimants of a prescribed description.[21] And claimants who may be subject to work preparation requirements only include those not subject to the no work-related requirements or the sole work-focussed interview requirement and have limited capability for work or are of a prescribed description.[22] The class of claimant may also be subject to a work-focussed interview but no other work-related requirement[23] and may include a claimant who is the responsible carer for a child aged 3 or 4 (assuming such person does not fall within the group who may be subject to work-focussed interview requirements only.[24]

13. Provision is made permitting the Secretary of State to require a claimant to participate in an interview for purposes relating to the imposition of work-related

---

15 In the opinion of the Secretary of State: Clause 16(1); add footnote above Clause 15.
16 Clause 17(1).
17 Clause 18(1) – (2).
18 Clause 19(1) – (2).
19 Clause 19(3).
20 Clause 19(6).
21 Clause 20(1).
22 Clause 21(1) – (2).
23 Clause 21(3) – (4).
24 See Clause 21(5) and Clause 20(1).

requirements, verifying compliance with the same or assisting the claimant to comply with them.[25]

14. The WRB then introduces a framework of sanctions where a claimant *"fails for no good reason"* to comply with the work-related requirements[26] in the case of claimants who may be subject to all work-related requirements. A failure is also sanctionable in respect of a claimant who may be subject to all the work-related requirements, if at any time before making a claim by reference to which an award is made, the claimant for no good reason failed to take up an offer of paid work or by reason of misconduct, or voluntarily and for no good reason, ceased paid work or lost pay.[27] Similarly, a failure is sanctionable if by reason of misconduct, or voluntarily and for no good reason, a claimant upon whom no work-related requirements may be imposed by reason of them falling within a prescribed class (that is, not because of limited capability or caring responsibilities) ceases paid work or loses pay so as to instead fall within the group who may be subject to all work-related requirements. Other sanctions may be imposed in relation to related failures to comply.[28] There is provision under section 28, WRB allowing for regulations to be made permitting the payment of additional payments where by reason of any sanction imposed a claimant will be *"in hardship"*.

15. The WRB makes provision for the abolition of the existing benefits (job seekers allowance, income support, housing benefit, council tax benefit, child tax credit and working tax credit and income-related employment and support allowance)[29] and makes provision for imposing claimant responsibilities, specifically claimant commitments, with related sanctions, in the meantime.[30] It is intended that employment and support allowance and job seekers allowance will continue alongside Universal Credit as contributory benefits but the WRB will align those benefits more closely with the provision for universal credit so replicating the work-related requirements and sanctions applicable to universal credit in the case of job seekers allowance and employment and support allowance.[31]

---

25 Clause 23.

26 Clause 26. See too Clause 22, claimants not falling within the other claimant groups may be subject to all other requirements.

27 Clause 26(4).

28 Clause 27.

29 Clause 34 and Chap 3 Part 1.

30 Part 2, WRB.

31 Note para 10 Explanatory Notes as to the fact that universal credit will replace working tax credit, child tax credit, housing benefit, council tax benefit, income support, income-based job seekers allowance and income-related employment and support allowance. Contributory based job seekers allowance and

Benefit Cap

16. Clause 93, WRB permits regulations to be made providing for a benefit cap to be applied to the welfare benefits to which a single person or a couple is entitled. A benefit cap for these purposes means ensuring that, where a single person's or couples total entitlement to welfare benefits in respect of the reference period exceeds the relevant amount, their entitlement to welfare benefits in respect of any period of the same duration as the reference period is reduced by an amount up to or equalling the excess.[32] The detail of this provision is to be formulated in regulations which will make provision, amongst other things, as to the manner in which total entitlement to welfare benefits for any period, or the amount of any reduction, is to be determined and for exemptions to the application of the benefit cap.[33]

Personal Independence Payment/DLA

17. Part 4, WRB introduces the new *Personal Independence Payment* which is to replace Disability Living Allowance ("DLA"). As the Explanatory Notes[34] explain: *"the purpose of the benefit is to contribute to the extra costs of overcoming the barriers faced by long-term disabled people to leading full and active lives"*. As with DLA, the new Personal Independence Payment is neither taxable nor means-tested. As with the DLA too, the Personal Independence Payment comprises of two *"components"*. DLA comprises *"a care component"* and *"a mobility component"*. The Personal Independence Payment will comprise *"the daily living component"* and *"the mobility component"*.[35] Provision is made such that the *"daily living component"* will be paid at the standard or enhanced rate depending upon whether a person's ability to carry out daily living activities is limited or severely limited and subject to prescription by regulations as to *"daily living activities"*.[36] The *"mobility component"* is too payable at a standard or enhanced rate depending upon whether a person's ability to carry out mobility activities is limited or severely limited and again *"mobility activities"* for these purposes will be the subject of prescription by regulations.[37] Clause 83, WRB gives a regulation making power permitting provision to be made that no amount in respect of Personal Independence Payment attributable to entitlement to the daily living component and the mobility component is to be payable where the person concerned

---

employment and support allowance will continue but will be aligned. Part 2, Chapter 1 makes provision in the interim and thereafter for contributory based benefits.

32 Clause 93(2).
33 Clause 93(4).
34 Para 337.
35 Clause 75(2).
36 Clause 76.
37 Clause 77.

is an in-patient in a hospital or similar institution or a resident of a care home, in circumstances in which any of the costs of any qualifying services provided for the person are borne out of public or local funds by virtue of any enactment which might be specified. Whilst the *"care component"* of DLA may be affected by a person becoming an in-patient in a hospital or a resident in a care home, the *"mobility component"* is unaffected. It is anticipated that the provision to be made addressing *personal independence payments* will remove this entitlement. Such exemption will only apply where the funding in part or full attributable to the costs of the qualifying services (that is medical or other treatment, accommodation, board, personal care and such services as may be prescribed)[38] comes from public or local funds.[39]

18. Provision is also made for the abolition of the Disability Living Allowance.[40]

Discretionary Payments (Budgeting Loans, Crisis Loans and Community Care Grants)

19. Clause 69, WRB provides for the repeal of the provision made allowing for crisis loans, community care grants and budgeting loans from the discretionary social fund. Instead provision is made allowing for new locally-administered assistance by local authorities.[41] No such provision has yet been made save that budgeting loans and alignment loans will be replaced by payments on account.[42]

Housing Benefit

20. Clause 68, WRB makes provision amending the Social Security Contributions and Benefits Act 1992 so as to permit the appropriate maximum housing benefit to be determined in accordance with regulations, including by reference to rent officer determinations but not limited to the same. This reflect the Secretary of State's intention to exercise such powers to provide for housing benefit to be determined by methods other than by reference to rent officer determinations[43] including by reference to the local housing allowance (which are themselves subject to limits[44]) and size criteria.

Regulations

---

38 Clause 83(4).
39 Clause 83(2).
40 Clause 87.
41 With Scotland and Wales deciding on the most appropriate arrangements for assistance.
42 Clause 98.
43 Explanatory notes, §§322 - 323
44 And more limited since they will be linked to CPI not RPI, as will Housing Benefit.

21. As can be seen, much of the detail of the various schemes provided for by the WRB will be prescribed in regulations to be made by the Secretary of State, generally subject to the negative regulation procedure.[45]

D. The Impact Assessments

22. The lead Department for the WRB is the Department for Work and Pensions (DWP) and they have published a number of impact assessments. The general assessments identify the purposes of the WRB which include the simplifying of a complex benefits system; incentivising work and cutting expenditure. The overarching document covering the impact assessments explains the approach to the assessments (*Welfare Reform 2011 assessment of impacts For introduction to the House of Commons on 16th February 2011*, DWP), as follows:

> **This document sets out the initial impact assessment for the 2011 Welfare Reform Bill. Individual impact assessments for the principle proposals contained in the Bill have been completed. In line with the impact assessment guidance, it is expected that the impact assessments will be updated on a number of occasions throughout the passage of the Bill. Individual impact assessments provide the most robust and accurate assessment possible for the policy changes proposed in the Bill.**
> **The proposals in the Bill impact on a wide variety of groups in different ways. A single overall cumulative Impact Assessment has not been produced.**
> **The scale of policy change provided for by the Welfare Reform Bill is significant, and is planned to take place over an extended period, beginning in 2011-12 with changes to lone parent obligations, and ending in 2017-18 with the completion of the transition to Universal Credit. Therefore the impacts build-up over a substantial period of time, and at a different rate for the various measures. To provide a single summary accurately taking account of the different timings would be analytically complex and extremely challenging. To simplify would risk providing a set of misleading impacts.**
> **Moreover the changes to social security benefits and tax credits contained in the Bill take place in a wider context of fiscal change. The impact assessments therefore do not account for wider changes that would impact on households**

[45] The negative resolution procedure means that regulations are subject to annulment in pursuance of a regulation of either House of Parliament but are not subject to any affirmative approval. See: Clauses 42 – 43 (save in respect of provision made in respect of pilot schemes which are subject to the affirmative resolution procedure (clause 43(3)) or where regulations made contain regulations under another enactment which would be subject to the affirmative resolution procedure, when they will be subject to affirmative resolution; Clause 68; Clause 91 addressing regulations made in respect of the personal independence payment provisions which may be made subject to the negative resolution procedure Clause 91(8), save where they prescribe questions pertaining to the ability to carry out daily living activities or mobility activities under clause 78 – clause 91(6)(a) – and in relation to certain matters regulations made under clause 78 in respect of persons under the age of 16 – clause 91(6)(b) and clause 94 (regulations in respect of the benefit cap are subject to negative resolution.

> **over the period, for example, the aim to increase income tax personal allowances to £10,000.**
> **Collectively these factors substantially limit the extent to which a cumulative impact assessment would provide an accurate analysis of the impacts of the Bill as a whole. Moreover, an amalgamated assessment is likely to obscure the impacts of individual policies rather than aid the understanding of those considering the Welfare Reform Bill in Parliament and the wider public.**[46]

23. The DWP has then indicated that it does not propose to conduct a cumulative impact assessment because of the complexity of so doing due, in part, to the variable timetable for the introduction of these changes and the wider influences that will affect the impact of the changes (fiscal change). According to the DWP such will (i) limit the accuracy of any analysis of the WRB and (ii) obscure the impacts of individual policies. This former explanation cannot be tested without the advice of actuarial experts and the latter does not seem to me to explain why a cumulative assessment could not have been undertaken alongside impacts of individual policies.

24. As to the Equality Impact Assessments (EIAs), the enclosures with my instructions indicate that they were not published until 9 March 2011, though the WRB was introduced into the House of Commons on 16 February 2011, that is after, then, the DWP decided to proceed with the Bill.

25. As to the approach taken to the EIAs, the DWP's general introduction to the WRB EIAs describes the DWP's approach (*Welfare Reform Bill 2011 Equality Impact Assessments: General introduction*):

> **To accompany the statement made by the Chancellor on 20 October 2010 on the Spending Review 2010, HM Treasury published 'An overview of the impact of the Spending Review 2010 on equalities' http://cdn.hm-treasury.gov.uk/sr2010_equalities.pdf. This set out HM Treasury's approach to considering the equality impacts. For tax and welfare measures, HM Treasury undertook a screening exercise and the overview published high level impacts of the Spending Review on groups protected by equality legislation. HM Treasury also indicated that after the statement on 20 October, full impact assessments would be considered and published by relevant departments in due course.**
> **Where appropriate, therefore, the Department for Work and Pensions has assessed the impact on equality of the proposed changes which are now contained in the Welfare Reform Bill. Proposals have been assessed in line with the current public sector equality duties which require the Department to show**

[46] P 3.

> **due regard when developing new policies or processes to the impact of the proposals on race, disability and gender (including gender reassignment).**
> **Wherever possible, we have also anticipated the new public sector duty being introduced by the Equality Act 2010 which comes into force from 6 April 2011. In some equality impact assessments, we have therefore considered the additional protected characteristics of age, sexual orientation, pregnancy and maternity and religion and belief.**
> **If relevant, definitions have been amended to reflect the implementation of changes introduced by the Equality Act 2010 from 1 October 2010. This, for example, covers the definition of disability, where we use the definition contained in the Equality Act rather than the overtaken Disability Discrimination Acts 1995 and 2005.**

26. The 'overview of the impact of the Spending Review 2010 on equalities' referred to and conducted by the HM Treasury referred to is a brief (10 page) document which sets out the high level impact of the Spending Review on groups protected and acknowledges the particular and adverse impact on women and men, people from certain ethnic groups and people with disabilities but with little detail.

27. As to the EIAs of the WRB, these are numerous (19) and, reflecting the DWPs approach, do not undertake any cumulative analysis – each EIA assesses the impact of the particular measure in the WRB under scrutiny and indeed in part assesses only the impact of the regulation making powers which will in due course introduce the detailed measures which will implement the policies reflected in the WRB. The main EIAs are considered below.

28. As to the *Welfare Reform Bill Universal Credit Equality Impact Assessment March 2011*[47], it states that:

> **This is an Equality Impact Assessment (EIA) for the Universal Credit measures in the 2011 Welfare Reform Bill. With respect to Universal Credit the Bill is an enabling Bill which takes a number of regulations in order to implement Universal Credit. Therefore the assessment of impact relates to the regulation making powers rather than to the Bill itself.**
> **The aim of Universal Credit is to ensure that work pays. This is to be achieved through a combination of earnings disregards, whereby earnings are not included in award calculations until they reach a certain point, followed by a simple 'taper' whereby benefits are reduced by a set amount (currently assumed to be 65p) for each additional £1 of post-tax income earned above the disregard.**

[47] Internal footnotes removed.

Universal Credit will be supported by a system of conditionality that will reflect an individual's circumstances – the majority of people will be expected to work toward full-time employment while some will only be expected to seek part-time employment. Others will only be expected to prepare for work or attend work-focussed interviews while people with substantial caring responsibilities, severe disabilities or illness will not have any work related conditions placed upon them (Bill provisions covering conditionality will be covered in a separate EIA).

In the steady-state, once all existing claims have been migrated to Universal Credit, some 2.7m households will have higher entitlements than they would have done under the current system, while 1.7m would receive less5. People who would receive less under Universal Credit will be entitled to transitional protection at the point of change. As set out in the Impact Assessment some of the notional reductions in entitlement will be offset due to people taking up entitlements for the first time.

Some detailed policy decisions have yet to be taken which will impact on the overall equality assessment and further Equality Impact Assessments will be published as part of the delivery of Universal Credit. Meanwhile, we will continue to examine the evidence, and consult with stakeholders through DWP forums such as the Policy and Strategy Stakeholder Forum and DWP Customer Insight programmes.

We have defined a pool for the purposes of assessing whether Universal Credit has a differential impact on different groups. Guidance from the Equality and Human Rights Commission (EHRC) states that the EIA should define the pool as being those people who maybe affected by the policy (adversely or otherwise) and that the pool should not be defined too widely.

We have defined the pool as all households who would otherwise have been on the legacy benefits or Tax Credits which are replaced by Universal Credit, people who are claiming contributory JSA or ESA, and those who become newly entitled as a result of the Universal Credit payment rules. Unless stated otherwise, the analysis in this EIA is consistent with this definition of the pool

Disability

…

…. Over a third of the potential Universal Credit caseload is likely to be a household with a disabled person.

<u>Opportunities to Promote Equality</u>

There should be an opportunity to promote equality for disabled people through improving work incentives and smoothing the transition into work.

……

Risks of Negative Impact

The majority of disabled households will receive comparable or higher amounts of support under Universal Credit compared to the current system, and stand to lose, on average, a lower notional amount than non-disabled households.

However, as Universal Credit will remove existing complexities and inconsistencies across the benefits and Tax Credits systems, some people could be entitled to less under Universal Credit than under the current system, including 13% of disabled households. In particular, the Government believes that the existing structure of overlapping disability payments causes confusion, and thus simplification is justified in order to remove unnecessary complexity and cliff edges in order to ensure that disabled people can benefit from improved work incentives and a smoother transition into work. As explained above, transitional protection will mitigate the impact on existing cases.

Universal Credit improves financial incentives to work for disabled people to approximately the same degree as for non-disabled households. It has less impact on the level of entitlement than for other groups because (subject to any changes to disability payments) disabled people on Universal Credit are more likely, in a static analysis, to be out of work. Universal Credit will have strong positive impacts on poverty rates amongst disabled people.

Gender

.....

Opportunities to promote equality

The majority of lone parents are women and the employment rate for lone parents, at 57% is 15 percentage points lower than the average10. Of those not in employment, the majority are looking for work or would like to work. Of those not working most are not doing so because they prefer to be with their children or because of childcare costs. Of all lone parents, around 80% are either in employment, looking for a job, or would like to work. Universal Credit presents an opportunity to promote equality with respect to employment and narrow the employment gap.

Risks of negative impact

Universal Credit will be calculated to incentivise work at a household level, and is expected to reduce the number of households in which there is no-one working by 300,000. Because the reward is for the first earner into work, there is some second earners might choose to reduce or rebalance their hours of work more in line with their families needs.

The Government believes that any such risk of decreased work incentives for women in couples is justified. The focus of

Universal Credit is to help workless households into work, since having no parent in work has been shown to have an impact on young people's lives and attitudes to work. Helping at least one person into work could help break the cycle of worklessness in a family.

Universal Credit involves integrating in and out-of-work payments that can currently go to both members of a couple. A single payment of combined benefit to a household, mimicking wages or a salary, can then be tapered away at a constant rate as earnings increase, making it much easier for couples to understand how their work decisions directly affect their benefit payments.

In recognition of the fact that different households budget and handle their finances in different ways, we are allowing couples to choose which of them should receive the Universal Credit payment. The Government believes that in the majority of cases decisions over allocation of household resources to pay for rent, food, costs associated with bringing up children and so on are best made by members of the household themselves as they are for non-Universal Credit claiming households.

Rather than allocation by the state choice over payment of joint claims will also create a level starting point for all couple claimants and in making a joint claim, both partners will be aware of and agree to the terms.

The Government intends to retain power to override nomination by members of a couple and to guide payments if required. For example, where there is proven misuse of money by one partner, we do already and aim to continue to have power to direct payment of benefit to the other partner, offering safeguards.

Race

Around 15% of the potential Universal Credit caseload are from an ethnic minority background, which is larger than in the population as a whole.

As outlined above, ethnic minorities are more likely to see increases in their entitlement than white households. This is largely because a higher proportion of ethnic minorities on Universal Credit are in couple families (36% of ethnic minorities are in couple families, compared to 21% of white households). Couples tend to benefit more from the increase in disregards set in Universal Credit.

<u>Opportunities to promote equality</u>

The single taper and reduced disregards in Universal Credit will improve work incentives, enabling us to promote equality of opportunity through increased employment. To maximise

the opportunities for work we will ensure that communications about this are appropriately targeted to ethnic minority groups.

Households from certain ethnic minority groups may experience difficulties navigating the benefits system, for example language difficulties can compound the challenges posed by a very complicated system. This is evidenced by the lower take-up rates for some benefits amongst households from certain minority backgrounds; under the current system people may claim one benefit but not be aware they are also entitled to claim others. As a result of creating a single, integrated benefit, Universal Credit awards will include all the elements to which a household is entitled. People from ethnic minority groups currently experiencing difficulties with claiming should gain from the greater simplicity and automation within Universal Credit.

<u>Risks of negative impact</u>

..

We are committed to ensuring equality of access for all claimants regardless of race so we aim to mitigate this risk through ensuring that claimants who have difficulty with reading and writing English will still be able to access our services as they do now.

(§§1-5, 10, 12, 17, 29, 30, 31, 46, 49, 50, 52, 68, 73, 74-77, 83, 92, 95-7)

29. The impact on age is addressed and as to gender reassignment, sexual orientation, religion or belief it is stated: *"The Department does not hold information on [transgender, sexual orientation, religion or belief] claimants and it is not likely that this will be available in the future. However the Government does not envisage an adverse impact on these grounds"* (§§113-115). As to pregnancy and maternity it is stated that: *"The Department only holds information on pregnancy and maternity where it is the primary reason for incapacity. It cannot therefore be used to accurately assess the equality impacts; however, the Government does not envisage an adverse impact on these grounds" "* (§116).

30. As can be seen, the introduction of Universal Credit may reduce the incentive for second earner (presumed usually to be a woman) to work and women in such circumstances may not retain access money paid in benefits, though in receipt of some now (because only one partner will receive all the benefits), so reducing women's autonomy over some of the family finances.

31. As to the *Household Benefit Cap Equality Impact Assessment March 2011*, it states that:

The level of the benefit cap will be set by the Secretary of State and based on the average weekly wage for working families. We estimate that on its introduction, the cap will be set at £500 a week for couple and lone parent households and at £350 a week for single adult households without children. Based on this, modelling suggests that around 50,000 households on out of work benefits will stand to have their benefits reduced by the policy, subject to their circumstances and eligibility for transitional protection. This is roughly 1% of the out-of-work benefit caseload. Broadly, the cap will affect large families with several children, who will be entitled to a significant amount of Child Tax Credit and who might also live in larger family homes and so be entitled to high levels of Housing Benefit, or households in high rent areas receiving large Housing Benefit payments. The Government is looking at ways of easing the transition for families and providing assistance in hard cases.

Approximately 40% of households who are likely to be affected by the cap will consist of five or more children whilst over 80% will consist of 3 or more children. Fewer than 10% of households likely to be affected by the cap will consist of no children at all.

Disability

Analysis, using the Department for Work and Pension's Policy Simulation Model, shows approximately half of the households that are likely to be capped contain somebody who is disabled as defined by the DDA. This is likely to be because households containing somebody defined a disabled by the DDA constitute around 45% of the overall benefit population.

However, not everyone defined as disabled by the DDA will have extra costs that the Government would expect to meet through the benefit system. The Government makes provision for those who do have extra costs as a result of a disability through Disability Living Allowance.

In recognition of their additional financial needs that some disabled people have, all households which include a member, including a child, entitled to Disability Living Allowance or Constant Attendance Allowance, (as an increment to an award of Industrial Injuries Disablement Benefit) will be exempt from the cap.

Customers who are disabled but not in receipt of Disability Living Allowance will also be able to avoid the impact of the cap if they start working at sufficient hours to receive Working Tax Credit.

Race

A large proportion of those affected by the benefit cap are likely to be large families, suggesting that households from cultural backgrounds with a high prevalence of large families will be affected most.

The Office for National Statistics finds that Asian households are larger than households of any other ethnic group. Households headed by a Bangladeshi person were the largest of all with an average size of 4.5 people in April 2001, followed by Pakistani households (4.1 people) and Indian households (3.3 people).

People from ethnic minority households are also more likely to be in receipt of an income-related benefit than those from a white household. This affects some groups in particular – 30 per cent of Pakistani and Bangladeshi households are in receipt of an income-related benefit compared to 19 per cent of white households. Despite relatively large family sizes, a smaller proportion of Indian households are in receipt of income-related benefits.

Based on internal modelling using the Department for Work and Pension's Policy Simulation Model, we estimate that of the households that are likely to be affected by the cap approximately 30% of them will contain somebody who is from an ethnic minority. Ethnic minorities form less than 20% of the overall benefit population.

In mitigation of the impact, from 2011, customers from all ethnic groupings will receive help in finding work from the Government's new Work Programme. This will be the biggest single welfare to work programme this country has ever seen. It will be built around the needs of individuals, providing them the right support at the right time.

The impacts of the policy for all groups are illustrated in paragraphs 8 - 13. The sample size of households affected is not sufficiently large enough for us to determine whether ethnic minority households are likely to be at the highest cash loss end of Table 2.

Gender
[W]e expect around 60% of customers who are likely to have their benefit reduced by the cap to be single females but only around 3% to be single men. Most of the single women affected are likely to be lone parents, this is because we expect the vast majority of households affected by this policy (around 90%) to have children. Approximately 60% of those who will be capped are single women. Single women form around 40% of the overall benefit population.

However, the impacts of the cap on women, can be mitigated by the support available to help lone parents move into work and become eligible for Working Tax Credit which will make them exempt from the cap.

(§§8-9, 14-17, 21-28).

32. There will be a disproportionate number of single parents (who are most likely to be women) affected (Table 1 and §27). According to the EIA, *"[o]n average households affected by the cap will lose around £93 a week. Around 35% will lose more than £100 per week whilst around 40% will lose less than £50 a week"* (§10). It also appears that the impact of other measures will compound the difficulties caused by the cap so that: *"Analysis shows that the introduction of the cap will limit for larger households claiming benefit in some parts of the country the necessary income to afford housing at the (new) Local Housing Allowance (LHA) rates, i.e. the 30th percentile of the market. We are looking at transitional arrangements for dealing with particularly hard cases. At lower percentiles of the market, the cap will still make some parts of the country unaffordable on Housing Benefit alone for larger households receiving benefit and it is difficult to accurately predict what will happen to the affected households, as it depends on households' behavioural responses and on the availability of accommodation. The impact on those affected will be that they will need to make a choice between a number of options including starting work, reducing their non-rent expenditure, making up any shortfall in Housing Benefit using a proportion of their other income or moving to cheaper accommodation or area. The Government is looking at ways of easing the transition for families and providing assistance in hard cases*" (§§12-13). Thus the combined effect – which is not assessed - of the benefit cap and housing policies will be significantly adverse for those affected. Further, there will be an adverse impact in relation to disability and ethnicity. The extent of the adverse impact on ethnic minority households is not determined since the sample size is not large enough (§26).

33. Again the impact on age is addressed and as to gender reassignment, sexual orientation, religion or belief it is stated: *"The Department does not hold information on [transgender, sexual orientation, religion or belief] claimants and it is not likely that this will be available in the future. However the Government does not envisage an adverse impact on these grounds."* (§§34-36). As to pregnancy and maternity it is stated that: *"The Department only holds information on pregnancy and maternity where it is the primary reason for incapacity. It cannot therefore be used to accurately assess the equality impacts; however, the Government does not envisage an adverse impact on these grounds" "* (§37). As to religion and belief and pregnancy and maternity, these are surprising and, frankly, doubtful conclusions given that larger families are associated with certain cultural backgrounds that might too be associated with certain religions and beliefs (and see, §35 below for recognition of the same) and, of course, pregnancy and maternity.

34. As to the *Housing Benefit: Size Criteria for People Renting in the Social Rented Sector Equality Impact Assessment March 2011*, it states that:

> **From 1 April 2013 it is intended to introduce size criteria for new and existing working-age Housing Benefit claimants living in the social rented sector. The size criteria will replicate the size criteria that apply to Housing Benefit claimants in the private rented sector and whose claims are assessed using the local housing allowance rules.**
>
> **Disability**
> **The proportion of disabled claimants affected by the measure is higher than for non-disabled claimants. Disabled claimants are, on average, older than non-disabled claimants. One consequence of this is that disabled claimants are also less likely to live in households with children. The size criteria affects a greater proportion of smaller households than larger households: Fewer people living in a household means that large accommodation cannot be justified under the size criteria, and Housing Benefit entitlement is reduced. This is often the case for households where the children have grown up and left home.**
>
> **Race**
>
> **Figures on the ethnicity of the household reference person in affected households indicates that black and minority ethnic claimants are less likely to be affected by the measure than white claimants. This is associated with a higher proportion of black and minority ethnic claimants having children living with them as part of their household, and a tendency to have larger families. This means that under the size criteria, larger properties are appropriate for the claimant.**
>
> **For the smaller number of black and minority ethnic households which are affected, average losses are larger. This is partially due to a higher proportion of black and minority ethnic claimants living in London where rents are higher than other parts of the country. It is also likely that having larger families, black and minority ethnic claimants are more likely to be under-occupying their accommodation when their children leave home.**
>
> (§§5, 43, 47-48).

35. The impact on age is addressed and as to gender reassignment, sexual orientation, religion or belief it is again stated: *"The Department does not hold information on [transgender, sexual orientation] claimants and it is not likely that this will be available in the future. However the Government does not envisage an adverse impact on these grounds"* (§§54-55). As to religion or belief, the EIA states that: *"We do not*

see, however, that any of these groups would be adversely affected by this measure, although where larger families are associated with a particular religion or belief they will be affected in the same way as has been outlined under ethnicity above" (§56). This recognises the link between religion or belief, ethnicity and family size which is not acknowledged in the *Household Benefit Cap Equality Impact Assessment* above. As to pregnancy and maternity it is stated that: *"The Department only holds information on pregnancy and maternity where it is the primary reason for incapacity. ……It cannot therefore be used to accurately assess the equality impacts; however, the Government does not envisage an adverse impact on these grounds"* (§57).

36. As to *Disability Living Allowance Reform Equality Impact Assessment March 2011*, it states that:

> **Disability Living Allowance (DLA) is a benefit that provides a cash contribution towards the extra costs of needs arising from an impairment or health condition. Disability Living Allowance is a tax free, non-means-tested and non-contributory benefit payable regardless of employment status. Although it is intended to contribute towards extra costs, measuring each individual's expenditure would be administratively complex and expensive. Entitlement and award levels are, therefore, based on proxies – care and mobility – as research at the time of Disability Living Allowance's introduction showed that they were the greatest sources of extra costs.**
>
> **The current Disability Living Allowance legislation provides automatic entitlements to certain rates on the basis of specific conditions and impairments, or the treatment an individual is receiving. As a result, eligibility for Disability Living Allowance is sometimes based on medical condition rather than the impact of that condition, meaning that support is not always appropriately targeted.**
>
> **There are now 3.16 million people receiving Disability Living Allowance and forecast expenditure on the benefit for 2010/11 is £12 billion. In just eight years the numbers claiming Disability Living Allowance has risen from 2.4 million to 3.2 million – an increase of 30%.**
>
> **Despite the fact that an individual can receive Disability Living Allowance both in and out of work, it is widely perceived to be an out of work benefit and receiving Disability Living Allowance in itself appears to reduce the likelihood of being in employment, even after allowing for the impact of health conditions or impairments.**

The detailed criteria that will be used in the new assessment to determine eligibility for the rates of the benefit will be specified in regulations. The proposed approach has been subject to consultation and is being developed in collaboration with a group of independent specialists in health social care and disability, including disabled people. A detailed equality impact assessment will be published with the regulations at which point full comments from the consultation will have been considered. As the assessment is developed further work will be undertaken to assess its likely impact, which will inform subsequent equality impact assessments. This will include testing a sample of Disability Living Allowance claims against the new assessment criteria.

Gender

At this stage, no potential adverse impacts on either gender have been identified. As the numbers of men and women in receipt of Disability Living Allowance is almost equal there is no reason to suggest that either men or women are more likely to be affected by the new benefit – either directly or indirectly.

Disability

..

Risk of negative impact

Proposals to replace Disability Living Allowance with a new benefit better focussed on supporting people to overcome barriers to participation provide an opportunity to promote equality of opportunity for disabled people least likely to live full and active lives. However, as the benefit becomes better targeted on those with the greatest needs it is likely that some disabled people, who may have self-assessed as needing support, but who have lesser barriers to participation, will receive reduced support. This is in line with the policy aim to focus support on those with greatest barriers to leading full and active lives. As the assessment is developed further work will be undertaken to assess its likely impact, which will inform subsequent equality impact assessments.

Opportunity to promote equality

Disabled people are best able to help identify with the Department the support most likely to be needed, therefore disabled people are being involved throughout the policy development process. The new assessment is being developed in collaboration with a group of independent health and disability specialists and representatives of disabled people. Equality 2025, organisations of disabled people and other groups are being consulted on the wider reforms. A formal public consultation was launched from 6th December 2010 and closed on 18th February 2011. Responses from the consultation will be used to inform secondary legislation on the detailed design of the policy including the new assessment criteria process.

Conclusion

The new benefit will be fairer, and may help to improve understanding that support is available both in and out of work. More regular reassessment and an objective, rather than self, assessment may mean reduced support for some people who have lesser or reduced barriers to participation. This is entirely consistent with the policy but it is possible that this group are more likely to be adversely affected.

Ethnicity

Background and statistics
Administrative data on the ethnic background of Disability Living Allowance recipients is not held for a sufficient number of people to be reliable. This is because information on the ethnicity of recipients is not collected when they submit a claim for Disability Living Allowance. However, data from the Family Resources Survey suggests that people from ethnic minority backgrounds are slightly less likely to receive Disability Living Allowance than people from white backgrounds.

Risk of negative impact
There is no evidence to suggest that the policy would be more likely to affect any particular ethnic minority group.

Conclusion
A slightly higher proportion of people from a white background receive Disability Living Allowance, which suggests this group may be more likely to be affected.

(§§1, 3, 4-5, 10, 13, 18-21, 22, 23-24)

37. The impact on age is addressed and as to gender reassignment, sexual orientation, religion or belief it is again stated: *"No data is collected on [gender reassignment, sexual orientation, religion/belief, pregnancy and maternity]. However, we believe that there are no grounds to suggest this policy will adversely affect DLA recipients based on [these grounds]"* (§§14, 28-31). There is no assessment of the provisions which if introduced by regulations as anticipated will remove the entitlement of those in care homes paid for out of public funds to the mobility element. The EIA notes this but does nothing to assess it but states that: *"The DLA mobility component for those in care homes will be retained until March 2013, and any subsequent changes will be rolled into the design of the new Personal Independence Payment. The policy objective in respect of this measure is to identify and remove any overlaps in the way in which the mobility needs of people in residential care homes are met. Therefore the Department will consider the support given by DLA against the responsibilities of care homes, and reflect the outcomes from this in the PIP eligibility criteria for people in residential care homes"* (§7). Thus it is suggested that any analysis will be

conducted at a later stage. Other aspects of the EIA which cause concern include the policy imperative – a target saving in expenditure of 20% (see, instructions §14) – might justify the impact. As my instructions indicate, the overview equality impact assessment published in the public consultation papers on DLA reform states that *"it is likely some disabled people with lesser barriers to leading independent lives will receive a reduced rate of support, but this has been justified by the policy aim to focus support on those with greatest needs."*

38. As to the *Locally delivered support to replace Social Fund Community Care Grants and Crisis Loans for general living expenses Equality Impact Assessment March 2011* it states that:

> **Changes announced in the November 2010 White Paper *Universal Credit: welfare that works* (Cm7957) will see Community Care Grants and Crisis Loans for general living expenses – which are the most discretionary elements of the current scheme – being replaced by new locally-based provision delivered by local authorities in England and devolved to the governments in Scotland and Wales.**
>
> **The Government is committed to removing burdens and controls from local government, and so there will be no new statutory duty requiring local authorities to deliver the service. Local authorities and the devolved administrations will have the flexibility to design new locally-based support to meet local needs and priorities in the best way that they see fit.**
>
> **In line with the Government's wider localism agenda, funding will not be ring-fenced, enabling local authorities and the devolved administrations greater freedom to deliver and dovetail with existing services as they see fit according to local needs.**
>
> (§§6-8)

39. The EIA reviews the proportion of claimants by reference to gender, disability, ethnicity and age (not the other protected classes) who are in receipt of such loans but does not review the likely impact of the change, no doubt because it is to be left to local authorities, without ring fenced funding or a relevant duty to determine provision. Given the fiscal crisis and the other pressures on local authorities, in the absence of ring fenced funding or a duty to make such provision, there is every reason to assume that continued provision will be in real jeopardy.

40. As to each of the EIAs described above, and as addressed below, the elements of the existing duties under s71, Race Relations Act 1976 (RRA), s49A, Disability

Discrimination Act 1995 (DDA) and s76A, Sex Discrimination 1975 (SDA) are not covered, with a broad overarching impact considered only. Further, notwithstanding the apparently policy of addressing the Public Sector Equality Duty (PSED) under s149, Equality Act 2010 (EA) the elements of the PSED and the grounds protected are not addressed. Again this is addressed below. Further, many of them are interim or provisional as can be seen pending the development of proposals for secondary legislation.

41. There are a number of other measures which have more or less been impact assessed, including the measures to be introduced removing income support for lone parents with a youngest child aged five or over under 5 and conditionality, sanctions and hardship which suggest adverse impact on certain protected classes but with limited consideration of the equality objectives under the equality duties.

42. In addition, to the arrangements identified in the *Locally delivered support to replace Social Fund Community Care Grants and Crisis Loans for general living expenses* EIA other provisions indicate a devolving of a number of social security benefits, currently provided nationally by central Government, to local authorities on a discretionary basis without providing any additional and/or ring-fenced budget allocation. The WRB provisions of concern for the EHRC in this regard are:

(a) As mentioned, abolition of discretionary payments (i.e. budgeting loans, crisis loans and community care grants) from the social fund and devolution of this provision to local authorities but with no statutory duty requiring them to deliver this service;

(b) Again as mentioned, removal of mobility component of DLA from people who are *'in-patients of a hospital or a resident of a care home, in circumstances which any costs of any qualifying services provided for the person are borne out of public or local funds by virtue of a specified enactment'*. The Commission is concerned that the 'qualifying services' (such as 'personal care') set out at clause 83(4) do not amount to a duplication of funding and that withdrawal of the mobility component will, therefore, have a serious negative impact on disabled people's independence;

(c) The proposal to take *"greater account of the successful use of aids and adaptations"* in assessing entitlement to DLA. The EHRC's concerns are that, in practice, eligibility for an aid or adaptation is not a guarantee it will be provided or provided consistently (for example, a disabled person may have access to a particular aid at the time of assessment but this may only be available for a limited

time). This does not appear to have been impact assessed (*Public consultation. Disability Living Allowance Reform* (2010) DWP, Cm 7984, §27);

(d) The proposal to consider *"whether or not we should take into account a child's support needs if they are being met from public funds by another institution, such as a school"* when assessing a child's entitlement to DLA. The EHRC's view is that support provided by a school, college or local authority to enable a child or young person to access education and participate in school life will not usually be transferable to a non-education context or as an aid to daily living. Moreover, to discount DLA entitlement against such provision undermines both the purpose of DLA as a benefit which meets additional disability-related living costs and of SEN provision and / or reasonable adjustments as facilitators of the individual's right to education. Again this does not appear to have been impact assessed (*Public consultation. Disability Living Allowance Reform* (2010) DWP, Cm 7984, §40).

43. Further, in relation to age, whilst age is considered, very little regard is given to the impact on the children whose parents or carers will be affected by the changes to be adopted in the WRB (see, the *Household Benefit Cap Equality Impact Assessment March 2011* for a stark example where the impact on children is not considered at all though those families with more children are most likely to be adversely affected).

E. Human Rights Act Statement

44. The WRB was accompanied by a statement under s 19 of the Human Rights Act 1998 (HRA) which requires the Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the provisions of the Bill with the Convention rights (as defined by s 1, HRA). The statement has to be made before the second reading. The Rt. Hon Iain Duncan Smith MP, Secretary of State for the Department for Work and Pensions, has made the following statement: "In my view, the provisions of the Welfare Reform Bill are compatible with the Convention rights" (see, §692, Explanatory Notes).

F. The Law and Advice

The Equality Duties

31. Section 71, Race Relations Act 1976 (RRA) requires that due regard be had to the need:

- to eliminate unlawful racial discrimination; and

- to promote equality of opportunity and good relations between persons of different racial groups.

45. Section 49A, Disability Discrimination Act 1995 (DDA) requires that due regard be had to the need:
    - to eliminate discrimination that is unlawful under the DDA;
    - to eliminate harassment of disabled persons that is related to their disabilities;
    - to promote equality of opportunity between disabled persons and other persons;
    - to take steps to take account of disabled persons disabilities even where that involves treating disabled people more favourably than other persons;
    - to promote positive attitudes towards disabled persons; and
    - to encourage participation of disabled persons in public life.

46. Section 76A, Sex Discrimination Act 1975 (SDA) requires that due regard be had to the need:
    - to eliminate unlawful discrimination and harassment; and
    - to promote equality of opportunity between men and women.

47. The PSED under s.149(1), Equality Act 2010 requires that due regard to be had to the need:
    - to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
    - to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
    - to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

48. The “relevant protected characteristics” for the purposes of the latter two limbs of s.149(1) are; age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation (not, then, marriage and civil partnership though they are otherwise “protected characteristics”; s. 4, Equality Act 2010).

49. The duties under s.149(1) are further particularised so that:

- By s.149(3), having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need
  - to remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
  - to take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
  - to encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
- By s.149(4) the steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
- By s.149(5), having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need
  - to tackle prejudice, and
  - to promote understanding.
- By s.149(6), it is made clear that compliance with the duties in s.149(1) may involve treating some persons more favourably than others, but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
- By s.149(8), a reference to conduct that is prohibited by or under the Equality Act 2010 inlcudes a reference to— (a) a breach of an equality clause or rule; (b) a breach of a non-discrimination rule.

50. This Duty reflects in large part the General Race, Disability and Gender Duties. The new duty, however, goes further in covering all the protected strands (save marriage and civil partnership) and all the unlawful acts and requiring not merely that equality of opportunity be "promoted" but that it be "advanced", including by having regard to the need to take specific steps to this end, making it a more substantive duty. Its consideration then in the context of the WRB, which is in part regressive, would have been very important indeed.

51. As to the meaning of "due regard", the statutory Codes of Practice provide much guidance. The *Statutory Code of Practice on the Duty to Promote Race Equality* (2002, CRE) advises that:

> ***"Four principles should govern public authorities' efforts to meet their duty to promote race equality. Those are:***
> ***promoting race equality is obligatory for all public authorities listed in Schedule 1A to the Act …***
> ***public authorities must meet the duty to promote race equality in all relevant functions;***
> ***the weight given to race equality should be proportionate to its relevance;***
> ***the elements of the duty are complementary (which means they are all necessary to meet the whole duty)."***
>
> (§3.2)

52. The requirement to have *"due regard"* to the equality aims or objectives, therefore,

> ***"requires that the weight given to race equality should be <u>proportionate</u> to its relevance to a particular function. In practice, this approach may mean giving greater consideration and resources to functions or policies that have most effect on the public, or on the authorities' employees. The authority's concern should be to ask whether particular policies could affect different racial groups in different ways, and whether the policies will promote good race relations."***

(*Statutory Code of Practice on the Duty to Promote Race Equality* (2002, CRE), §3.5, emphasis added).

53. According to the statutory *"Gender Equality Duty Code of Practice (England and Wales)"* (2007):

> ***"Having due regard means that the weight given to the need to promote gender equality is proportionate to its relevance to a particular function. In practice, this principle will mean public authorities should prioritise action to address the most significant gender inequalities within their remit, and take actions which are likely to deliver the best gender equality outcomes."***
>
> (§2.22).

54. Where the relevance of a function is high, the authority will have to take particular care to ensure that it can demonstrate that it has met the General Duty in exercising that function (§3.64). *""Due regard" comprises, then, two linked elements: proportionality and relevance. In all their decisions and functions authorities should give due weight to the need to promote disability equality in proportion to its relevance. This requires more than simply giving consideration to … equality."* (*The Duty to Promote Disability Equality: Statutory Code of Practice* (2005, DRC), §2.34).

55. The General Equality Duties, through the "due regard" obligation, require a public authority *"to assess whether … equality is relevant to their functions. If it is, the authority should do everything it can to meet the general duty"* (The Race Code, §3.3), so that proportionate regard can then be had to the equality objectives in s.71(1), Race Relations Act 1976, s.49A, Disability Discrimination Act 1995 and s.76A, Sex Discrimination Act 1975. This means that, in relation to the effects of its current or proposed policies or to the way any of its functions are carried out,

> ***public authorities could ask themselves the following questions. Could the policy or the way the function is carried out have an adverse impact on equality of opportunity for some racial groups? In other words, does it put some racial groups at a disadvantage? Could the policy or the way the function is carried out have an adverse impact on relations between different racial groups? Is the adverse impact, if any, unavoidable? Could it be considered to be unlawful racial discrimination? Can it be justified by the aims and importance of the policy or function? Are there other ways in which the authority's aims can be achieved without causing an adverse impact on some racial groups? Could the adverse impact be reduced by taking particular measures? Is further research or consultation necessary? Would this research be proportionate to the importance of the policy or function? Is it likely to lead to a different outcome? If the assessment suggests that the policy, or the way the functions is carried out, should be modified, the authority should do this to meet the general duty"***
>
> (*Statutory Code of Practice on the Duty to Promote Race Equality* (2002, CRE), §3.16).

56. The Duties are "continuing" and "[w]hat a public authority has to do to meet it may change over time as its functions or policies change, or as the communities it serves change" (Statutory Code of Practice on the Duty to Promote Race Equality (2002, CRE), §§3.7; *R (Bapio Action Limited) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 per Sedley LJ at §3; *Kaur (R oao) v London Borough of Ealing* [2008] EWHC 2062, §24; *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) and *R (Watkins-Singh) v Governing Body of Aberdare Girls High School* [2008] EWCA 1865 (Admin)). They are also prospective, as was emphasised by Elias J in *R (Elias) v Secretary of State for Defence* [2005] IRLR 788 (and these observations were undisturbed by the Court of Appeal: *SoS for Defence v Elias* [2006] EWCA Civ 1293): "the purpose of this section is to ensure that the body subject to the duty pays due regard at the time the policy is being considered – that is, when the relevant function is being exercised – and not when it has become the subject of challenge" (§99). In finding that there was a breach of the s. 71 duty in that case, Elias J held that*: "It is nowhere suggested that there was any careful attempt to assess whether the scheme raised issues relating to racial equality, although the possibility was raised; nor was there any attempt to assess the*

extent of any adverse impact, nor other possible ways of eliminating or minimising such impact" (§97).

57. Importantly, the General Equality Duties require that "due regard" is had to each of the constituent elements of the Duties (the need to eliminate unlawful discrimination; promote equality of opportunity etc); *R (Elias) v. Secretary of State for Defence* [2005] IRLR 788, §100; see too *R (Smith) v. South Norfolk Council* [2006] EWHC 2772 (Admin), §36, in a passage endorsed by Dyson LJ in *R (Baker & Others) v. Secretary of State and London Borough of Bromley* [2008] EWCA 141. This has not been done in the case of the WRB as the EIAs demonstrate.

58. The EHRC has not yet promulgated a statutory Code of Practice on the PSED. However, the guidance set out in the statutory Codes of Practice above are likely to apply to the PSED, in material respects, *mutatis mutandis* because the PSED adopts the same *"due regard"* model. According to the Government's own guidance: *"having due regard means consciously thinking about the three aims of the general duty as part of the process of decision-making. This means that consideration of equality issues must influence the decisions reached by public bodies"* (*"Equality Act 2010: Public Sector Equality Duty, What Do I Need to Know? A Quick Start Guide for Public Sector Organisations"* (2010, GEO), page 5). The Equality and Human Rights Commission has issued non-statutory guidance and this is available on their website (www.equalityhumanrights.com).

59. The threshold for the triggering of the General Race, Disability and Gender Equality Duties and the PSED is a low one and will be certainly be triggered by the important changes to be made in the WRB. The General Race, Disability and Gender Equality Duties and the PSED will be engaged where there is an *"issue which needed at least to be addressed"* (*R (Elias) v Secretary of State for Defence* [2005] EWHC 1435 (Admin), §98).

60. Compliance with the General Equality Duties and the PSED requires conscientiousness, rigour and an open mind when due regard is had (*R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), §§91-92). Such can only occur where the decision maker is aware of the Duties (*R (Chavda) v Harrow LBC* [2007] EWHC 3064 (Admin)).

61. There has been much discussion in the case law about whether a formal EIA is a necessary requirement of the *"due regard"* obligation and, if so, the contents or form of such an EIA. This discussion emanates from the shape of the Specific Statutory Duties, enacted under the RRA, SDA and DDA "*for the purpose of ensuring the better performance*" of the General Equality Duties. These Duties required the preparation of an equality scheme by the bodies subject to the Specific Duties and those schemes were required to set out the body's arrangements for, *inter alia*, assessing the likely impact of its proposed policies on the promotion of race, disability and gender (see below). The purpose of the assessment process is to assist the public authority in identifying and finding the relevant facts which will then help it in giving *"due regard"* to the equality objectives set out in the Equality Duties, and to undertake the necessary weighing of those equality objectives against the purpose of the policy.

62. The need for an equality impact assessment is reflected in the statutory Codes of Practice (*"Code of Practice on the Duty to Promote Race Equality"* (2002), Commission for Racial Equality and see the non-statutory guidance in *"The Duty to Promote Race Equality: A Guide for Public Authorities"* (2002), Commission for Racial Equality, §§3.5 – 4.2 of the Code and see the diagrammatic stages identified in the Guide, both pointing to the need for an equality impact assessment for the purposes of discharging the Duty under the RRA).

63. Whether a public authority has demonstrated *"due regard"* to the equality objectives in the Equality Duties will often turn on the question whether they have indeed undertaken an EIA before introducing the policy in question (*Secretary of State for Defence v Elias* [2006] EWCA Civ 1293 and *R (Watkins-Singh) v Governing Body of Aberdare Girls School* [2006] EWHC 1865 (Admin)). Case law makes clear that an equality impact assessment may well be required (*R (BAPIO & Anor) v. Secretary of State for the Home Department and Secretary of State for Health* [2007] EWHC 199), at least where there is a risk of adverse impact (*R (Fawcett) v Chancellor of the Exchequor and O'rs* [2010] EWHC 3522 (Admin), §17). In any event, as to the WRB, the *only (or at least the main)* evidence of *due regard* is contained in the EIAs. Further, where a public authority has committed itself to undertaking an equality impact assessment – whether under its equality scheme or otherwise – it will be unlawful, as a matter of public law, not to undertake such an assessment unless there are compelling reasons not to do so (*Kaur (R oao) v London Borough of Ealing* [2008] EWHC 2062, §27). This is also important because of the Government's

commitment to conducting such EIAs including by reference to the PSED (as is reflected in the Introduction to the EIAs though if any challenge is to be mounted the Government's policy commitments to EIAs will need to be extracted).

64. An impact assessment must be undertaken as a matter of substance and with rigor: *R (Kaur & Shah) v. London Borough of Ealing* [2008] EWHC 2062 (Admin). A written record of such an analysis is expected where any significant examination of discrimination issues has in fact been undertaken: *R (BAPIO Action Ltd) v Secretary of State for the Home Department and Secretary of State for Health* [2007] EWHC 199 (QB), §69, per Stanley Burnton J; *R (Kaur & Shah) v. London Borough of Ealing* [2008] EWHC 2062 (Admin), §25, per Moses LJ. Necessarily, the greater the likely impact on the equality objectives enumerated in the Equality Duties (whether negatively or positively), the greater weight those objectives must be given in the decision making process. Where in undertaking the due regard exercise a public authority identifies that a policy or proposal may have potentially negative impact, the due regard obligation will require that that is weighed and weighed against the aims sought to be realised by any policy or proposal and, in particular, whether the effects can be mitigated. Where a public authority has *"identified a risk of adverse impact, it [is] incumbent upon [them] to consider the measures to avoid that impact before fixing on a particular solution"* (*Kaur (R oao) v London Borough of Ealing* [2008] EWHC 2062, §43). EIAs are intended to assist in that process.

65. As mentioned, the Specific Equality Duties[48] require listed public authorities to publish, respectively, a Race, Disability and Gender Equality Scheme in each case *"showing how it intends to fulfil" its* General Equality Duty in each case and how it intends to fulfil its Specific Equality Duties.[49] Such Scheme must also set out, amongst other things, the authority's arrangements for gathering relevant information

---

48 Race Relations Act 1976 (Statutory Duties) Order 2001, SI 2001/3458; the Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 SI 2005/2966 and the Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006 SI 2006/2930. Again as those instructing me well know, the Government published draft Regulations on 12 January 2011 setting out the Government's plans for Specific Duties under s. 153, Equality Act 2010 and the Government has laid them before Parliament for debate and enactment (draft Equality Act 2010 (Statutory Duties) Regulations 2011. The Government has changed its' mind about those duties, withdrawn them and are consulting again on the content of the Duties (*Equality Act 2010: The Public Sector Equality Duty: Reducing Bureaucracy, Policy review Paper, 17 March 2011*). It is not expected that such duties will be enacted for some time and as of 5 April, the old Specific Duties will be revoked but the PSED will be in force and the law as it has applied through the case law will continue to apply.

49 Art 2(1), Race Relations Act 1976 (Statutory Duties) Order 2001, SI 2001/3458; Reg 2(1), Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 SI 2005/2966 and Art 2(1), Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006 SI 2006/2930).

and/or monitoring (on the effect of its policies on the protected classes).[50] The Duties anticipate, then, that consultation and data collection will form part of the *"due regard"* exercise. The importance of consultation to proper compliance with the Duties has recently been emphasised *especially* where the data held by the public authority is inadequate where it will be necessary to have "evidence based decision –making" and to avoid that which is not permissible, namely "policy based evidence" (see, *R (Rahman & Ors) v Birmingham City Council* CO/1888/2011, extempore judgment 31/3/2011). It is not clear whether there has been inadequate consultation on the EIAs (though I suspect there has been little given the paucity of information in them) but it is clear that there has been inadequate information gathering, data collection and monitoring.

66. The EHRC has published guidance in the context of financial decision-making (*"Using the equality duties to make fair financial decisions"*) which advises as follows: *"Assessing the impact of proposed changes to policies, procedures and practices is not just something the law requires, it is a positive opportunity for public authorities to ensure they make better decisions based on robust evidence. Such assessment does not necessarily have to take the form of one document called an Equality Impact Assessment (EIA), although this is what we recommend as it is likely to help public authorities:*

- *ensuring they have a written record of the equality considerations they have taken into account*
- *ensuring that their decision includes a consideration of the actions that would help to avoid or mitigate any unfair impact on particular equality groups.*
- *making their decisions based on evidence*
- *making the decision-making process more transparent*
- *comply with the law*

If a public authority chooses not to undertake an EIA, then some alternative form of analysis which systematically assesses any adverse impact of a change in policy, procedure or practice will be required."

67. This guidance has already been referred to in a successful challenge to certain of the recent cuts (*R (Rahman & Ors) v Birmingham City Council* CO/1888/2011, extempore judgment 31/3/2011).

---

[50] Art 2(2),Race Relations Act 1976 (Statutory Duties) Order 2001, SI 2001/3458; Reg 2(3), Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 SI 2005/2966 and Art 2(6), Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006 SI 2006/2930).

68. As to the need for a cumulative EIA where a number of decisions may affect the overall impact on a particular group, in *R (Fawcett) v Chancellor of the Exchequer and O'rs* [2010] EWHC (3522 (Admin) the Court (on a first instance permission application) determined that a cumulative assessment of the Budget was not required and a 'line by line' assessment was adequate. However, very importantly the Court noted the *"polycentric nature of the decision making process"* making such an assessment difficult (§§7-8). There is a risk that a Court would so conclude in the case of the WRB but it is very much less likely since the changes therein all pertain to a single aspect of Government policy (welfare reform) promoted by a single department (DWP) and there is a real likelihood of overlapping or cumulative impact. I do not consider that the *Fawcett* case should therefore be considered to preclude a challenge based on the absence of a cumulative EIA.

69. There are other potential difficulties with a challenge based on the EIAs though neither of these certainly preclude a challenge of which the EHRC should be aware but in my judgment, these are not insurmountable.

70. Firstly, difficulties arguably arise because the Bill has now entered Parliament and matters in connection with it may attract the exceptions in s76A, SDA, s49C, DDA and Sch 18, paragraph 4(2)-(3), EA (in respect of the PSED) which preclude the application of the Duties to *"a function in connection with proceedings in the House of Commons or the House of Lords"* in the case of the SDA and EA and *"an act of, or relating to, making or approving an Act of Parliament"* in the case of the DDA. Importantly, in my view, the RRA contains no such exception but does not include the Houses of Parliament in Sch 1A (bodies to which the Duty applies) which indicates that in enacting these exemptions, the development and analysis of policy ancillary to a Bill (such as might be gleaned from the conducting, and outcome, of EIAs) and/or a decision to introduce a Bill are not intended to be covered but instead, more narrowly, the proceedings in Parliament themselves. A point in relation to the application of these exemptions was not taken by the Government in the *Fawcett* case, though many of the Budget measures were ultimately enacted in primary legislation. The judge in the *Fawcett* case observed that:

> I also have real reservations about the appropriateness of saying that legislation which has been presented to and passed through Parliament is unlawful and have difficulties in seeing how that fits in with the exclusionary provision from the duty in section 76A(4), at least once legislation was placed before the House of Commons.

> That is not to say that it could not be raised earlier, but for some time now it has been academic. (§11).

71. However, there is authority indicating that the adequacy and findings of an impact assessment on a Bill may be the subject of judicial scrutiny (*R (on the application Sinclair Collins Ltd) v SoS for Health* [2010] EWHC 3112 (Admin), in the context of EU law and though not engaged here, fundamental rights are; see too, *R (Seabrook Warehousing Ltd & O'rs) v Com'rs for HM Revenue and Customs* [2010] EWCA Civ 140). In my view, given what in my judgment is the intended limits of the exemption, a challenge (a) to the failure to conduct EIAs before the introduction of the Bill and (b) a challenge to the adequacy of the EIAs that have been conducted are not precluded by the exemptions.

72. This question obviously raises a very important point of principle. If the application of the Duties could be avoided in the development of legislative policy because of the exemptions this would significantly limit the impact of the Duties on the most important matters of policy development. As I have indicated, it is my view that this is not what is intended by the exemptions.

73. Secondly, any proceedings in judicial review must be issued **very promptly**. The Bill represents a key plan of Government policy and is intended to have a short legislative timetable, according to my instructions. The EHRC will be expected to mount any challenge which may effect the progress of the Bill immediately that they identify the grounds for challenge. The importance of this cannot be overstated. Any challenge based on the fact that EIAs were not undertaken prior to the introduction of the Bill especially should be issued as soon as authority can be obtained if the EHRC are to mount such proceedings. The position otherwise is that the EHRC will be prejudiced by delay and the issue may become academic (as it did in *Fawcett*) if the WRB is enacted before proceedings can be heard. In *Fawcett* proceedings were issued within 5 weeks of the Budget (well within the 3 months long stop for judicial review) and such was considered to amount to delay so as to preclude a challenge (§19). Six weeks have now expired since the introduction of the WRB to Parliament without EIAs and proceedings must there be issued immediately if the EHRC intend to proceed by way of judicial review.

74. For completeness, those instructing me could await the specific measures to be introduced by regulation and challenge those. However, there is a danger that that

will be regarded as too late given that the policy objectives behind the WRB are now known and thus the discriminatory impact, foreseeable (*R (Domb) v LB Hammersmith and Fulham* [2009] EWCA Civ 941 §78) (though of course this should be kept under review).

75. The EHRC has specific enforcement powers relating to the Duties which they may consider using. In particular, the EHRC may assess the extent to which or the manner in which a person has complied with the General or Specific Race, Disability and Gender Equality Duties (s.31, Equality Act 2006). If the EHRC thinks that the DWP has failed to comply with such a Duty it may serve a compliance notice upon the DWP requiring them to comply with the Duty and to provide information to the EHRC identifying the steps taken or proposed to be taken for the purpose of complying with the Duty. This does not preclude proceedings in Judicial Review in respect of the General Race, Disability and Gender Equality Duty, by the EHRC and to the extent that a failure to comply with the Specific Equality Duties evidences a failure to comply with the General Equality Duties, such may be relied upon as the case law makes clear (and see, s. 30, Equality Act 2006; *Equality and Human Rights Commission (R on the application of) v Secretary of State for Justice* [2010] EWHC 147 (Admin)). Judicial review proceedings are likely to achieve a more speedy resolution.

76. As to the EIAs and compliance with the Equality Duties, the approach adopted to the introduction of the WRB may be challenged on the grounds that:

(a) The WRB and the formulation and determination of the policies reflected in it was introduced without any EIAs;

(b) Notwithstanding the later EIAs, the policies reflected in the WRB have been inadequately equality impact assessed such that due regard has not been properly paid to the equality objectives enumerated in the equality duties because of three principal failures,

(i) A failure to collect the data necessary to determine impact adequately or at all on certain groups;

(ii) A failure to impact assess against each of the enumerated objectives (to promote equality of opportunity and good relations between persons of different racial groups; to take steps to take account of disabled persons disabilities even where that involves treating disabled people more favourably than other persons etc);

(iii) A failure to conduct a cumulative assessment at least in respect of the main policy measures that re likely to impact separately an thus cumulatively on the protected groups.

(c) The policy of introducing the changes to welfare anticipated in the WRB, by effectively a legislative framework and broad permissive regulation making powers has not, so far as I can deduce, been impact assessed, though it impacts on the Government's ability to assess the ultimate impact of the measures anticipated in the WRB.

(d) The policies reflected in the WRB have not been adequately impact assessed in accordance with the DWP's Equality Scheme *("Department for Work and Pensions Race, Disability and Gender Equality Schemes 2008 – 2011"*).

(e) Because of these failures, *"due regard"* has not been had to the equality objectives enumerated in the Equality Duties.

(f) Challenging the WRB, through legal proceedings in judicial review, because of a failure to carry out an adequate equality impact assessment will be difficult unless action is taken immediately.

77. As to the question whether certain of the measures are justified having regard to the relatively small savings that might be made and/or the significant adverse impact, this is problematic. The duties impose procedural obligations. Only where the process (*Due regard"*) has not been gone through or the decision is perverse (*Wednesbury* unreasonable sense) or otherwise made in breach of a public law obligation will it be capable of challenge. Governments are generally given significant latitude in developing social and fiscal policy. Nevertheless given the absence of proper assessments, it is possible to argue that adequate weight cannot have been given to the adverse impact (in the *due regard* exercise) since that impact has not properly been assessed and *due regard* has not properly been had to the equality objectives.

HRA

78. The Human Rights Act 1998 (HRA) contains a number of relevant Convention rights[51], namely,

- First Protocol, Article 1 (protection of property)
- Article 3 (prohibition of inhuman and degrading treatment)

[51] For completeness, there is a right to a fair hearing by an independent and impartial tribunal when the right to access benefit or to continue to access benefits is determined (Article 6(1), ECHR; *Nibbio v Italy* (1992) Series A No 228-A; *Salesi v Italy* (1993) 26 EHRR 187). I am not clear whether this is an issue of concern so far as the WRB relates.

- Article 8 (right to respect for private and family life)
- Article 14 (prohibition of discrimination)

79. The provision made in the WRB *may* result in a violation of one or other of these rights. However, such is difficult to determine because of the extent to which the detail of the measures to be introduced will be determined by regulations. As mentioned above, the Secretary of State has promulgated a statement of compatibility under s19, HRA. It might be said that such a statement cannot be properly given where much of the detail is not yet transparently known. This is an issue that has been raised in the context of the Public Bodies Bill (JCHR, *Legislative Scrutiny: Public Bodies Bill; other Bills Seventh Report of Session 2010–11*, p 4):

> **The key issue in debates so far on the Bill has been the constitutional propriety of the scope of the delegated powers proposed in the Bill, to abolish or rewrite existing statutory frameworks without full opportunity for parliamentary scrutiny. We comment on this issue only to reiterate the extent to which the excessive use of delegated powers may reduce the effectiveness of parliamentary scrutiny for human rights compatibility of proposed legislation. A skeleton bill of this nature makes human rights analysis extremely difficult, particularly where there is limited information on the proposed use of the power, the reason for the creation of the power and evidence to support its proportionality. Without greater detail on these issues it is difficult to assess whether changes to a proposed body will have a positive or negative impact on the ability of the UK to meet its international and domestic human rights obligations.**
> **The breadth of delegation proposed in this Bill appears wholly inappropriate. We reiterate our view that parliamentary oversight of matters which engage individual rights and liberties is particularly important, and delegated powers which may impact upon individual rights or liberties and affect the ability of the UK to meet its international obligations must be justified by the Government and accompanied by adequate safeguards to ensure that infringements do not arise because secondary legislation has been subject to inadequate parliamentary oversight.**
> **In the light of criticism of the Bill in the House of Lords the Government has proposed changes to the Bill. In our view, these changes to the procedural arrangements in the Bill, and to the bodies listed in the Bill, do not go far enough. We remain concerned that the broad use of delegated powers in the Bill would continue to undermine the ability of Parliament to influence or prevent changes to the operation, functions and existence of bodies which may play an essential part in the machinery for the protection of individual rights and liberties in the UK.**

80. The question whether a s19 statement may be challenged on this basis raises an issue of significant constitutional importance. The section 19 process was intended to be an important protection introduced by the HRA as part of the framework for protecting the Convention rights domestically. Some commentators consider that such a statement is not challengeable (because of the Bill of Rights 1689 and the prohibition on impugning Parliamentary proceedings in judicial proceedings) (policy (Clayton & Tomlinson, *"The Law of Human Rights"*, §4.65-6). However, the limits of

that privilege is subject to other compelling legal considerations (for example, directly effective EU law; (*R (on the application Sinclair Collins Ltd) v SoS for Health* [2010] EWHC 3112 (Admin)) and it is not at all clear, in any event, that challenging a s19 statement might be said to impugn or question proceedings in Parliament. As I have mentioned, this is a very important issue on which there is presently no authority (so far as I am aware) and if proceedings are to be brought by the EHRC in judicial review, on the basis of the Equality Duties, as above, consideration should be given to bringing a challenge based on the fact that given the breadth of the regulation making powers, the Secretary of State cannot have been in a position to make the statement under s19 and as such it has no proper legal basis and/or is *Wednesbury* unreasonable.

81. A s19 statement is, in any event, not binding on any court, of course. It represents only the view of the Secretary of State and so would not preclude a challenge based on the Convention rights.

82. As to the Convention rights engaged, the European Court of Human Rights ("ECtHR") has long treated contributory benefits as "possessions" for the purpose of Article 1, Protocol 1 ECHR. Any interference with or deprivation of established rights to contributory benefit must strike a "fair balance" between the right of the individual to peaceful enjoyment of their possessions and the public interest and must be "in accordance with law" (in order to be "in accordance with law" measures must have a basis in domestic law and be sufficiently precise to allow people to foresee the consequences of their actions). Recent case-law suggests that all benefits must be treated as possessions protected by the Convention (*Muller v Austria* App No 5849/72, 3 DR 25). It can be noted too that the Explanatory Notes to the WRB acknowledge the impact of Article 1, Protocol 1 to the key provisions in the WRB (see, Explanatory Notes, §694). As the Explanatory Notes record, however, that Article 1 "*does not guarantee the content of any such right or possession (Marckx v Belgium (1979) 2 EHRR 330, confirmed in the admissibility decision in Stec v UK 67531/01 (2005) ECHR 724)). Thus where a person does not meet the conditions of entitlement to benefits (such as universal credit, or a personal independence payment) this cannot be incompatible with Article 1 Protocol 1. Similarly, where a person ceases to meet the conditions of entitlement, that person will no longer have a possession for the purposes of Article 1 Protocol 1, which only applies so long as the statutory conditions of entitlement are met. The Government also considers that it is legitimate to make changes to the existing conditions of entitlement"* (§694).

Further, States do enjoy a wide “margin of appreciation” in respect of the establishment of domestic welfare systems: that is to say, the ECtHR allows states some considerable leeway in how they design their welfare systems (*Stec*). However, although this margin is wide, it is not unbounded. Social welfare systems must be administered in a way that is not arbitrary and is not based upon unjustified discrimination (*Stec*; *Zeman v Austria*, App No 23960/02 Judgment dated 29 June 2006). Changes to existing benefits also must not be such as to take away the very essence of the right to peaceful enjoyment.

83. Further, a positive obligation is imposed on the State to ensure that individuals are not exposed to destitution and hardship at a level which will endanger their right to respect for private or family life (Article 8 ECHR) or amount to inhuman or degrading treatment (Article 3 ECHR) (*R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396). As to Article 3: *“Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life. It is not necessary that treatment, to engage article 3, should merit the description used, in an immigration context, by Shakespeare and others in* Sir Thomas More *when they referred to "your mountainish inhumanity"”* (§7, per Lord Bingham, (*R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396). And:

> **"As regards the types of 'treatment' which fall within the scope of article 3 of the Convention, the court's case law refers to 'ill-treatment' that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible."**
>
> (*Pretty v United Kingdom* 35 EHRR 1, 33, § 52):

84. There must be a real concern that the measures proposed in the WRB, including the cap on benefits which will disproportionately impact on larger families, the removal of discretionary payments (including crisis payments) and the sanctions regime, will result in violations of Articles 3 and/or 8.

85. Further, and as to the Housing Benefit changes, Article 8 is plainly engaged and may be violated by any eviction in consequence (*Manchester City Council v Pinnock (Secretary of State for Communities and Local Government and another intervening)* [2010] UKSC 45), subject to proportionality which may be difficult to assess in proceedings resulting from changes in law leading directly to such eviction. There is a real risk that the measures will then violate Article 8.

86. Further, Article 14 will be engaged because of the discriminatory impact of certain of the measures. Their full impact cannot be determined because of the inadequate EIAs but as appears above, it is plain that there will be some disproportionate impact as against protected classes, including women, disabled people, certain ethnic minority groups and, although not the focus of scrutiny in the EIAs, children especially in larger families or single parent families. There is also disproportionate impact on large families (which overlaps too with certain ethnic minority and probably religious groups). As those instructing me well know, Article 14 of the ECHR provides that:

> **The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.**

87. As can be seen, this Article 14 does not contain free standing protection against discrimination but has a wide reach nonetheless. As referred to above, the measures in issue plainly fall within the scope of Article 1, Protocol 1 and Article 8 and probably Article 3 and as such Article 14 will be engaged (*JM V UK* [2010] ECHR 37060/06). Case law from the ECtHR demonstrates that Article 14 will be violated where:

- the alleged discrimination falls within the ambit of another Convention Article;
- there is a difference of treatment between the applicant and other persons in relevantly similar situations;
- the difference of treatment is on a ground protected (explicitly or otherwise) by Article 14; and

- the difference in treatment is not justifiable.

88. The case law "establishes that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations" (*Willis v. the United Kingdom*, (2002) 35 EHRR 21, §48). Further, case law from the ECtHR now makes clear that wider forms of discrimination are also addressed by Article 14 such that a failure to treat some groups *differently* or *more favourably* will violate Article 14 in certain circumstances (*Thlimmenos v Greece* (2001) 31 EHRR 14) which will be relevant to the DLA changes.

89. Further, in the very important decision of the Grand Chamber in *DH v Czech Republic* (2008) 47 EHRR 3 the Court went further than its previous holdings in ruling that disparate outcomes may violate Article 14, absent proof that they are not connected to one of the protected characteristics and absent justification. Article 14 then may address what is commonly described as "institutional" (caused by policies and practices which disadvantage one group or another) and "structural" (caused by *de facto* segregation and exclusion) discrimination and imposes a duty upon the State to take steps to avoid it and this will be relevant to the WRB measures since they may result in pockets or ghettos of poverty and/or create disparate outcomes for certain protected classes. In *DH & Ors v the Czech Republic* the ECtHR found a violation of Article 14 on the basis of facts demonstrating that more than half of Roma children in the Czech Republic attend special schools (those for children with a "social or mental handicap"). According to the Court:

> **The Court has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations…. However, Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article …The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group…., and that discrimination potentially contrary to the Convention may result from a de facto situation...**
> **Discrimination on account of, inter alia, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment….. The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively**

> **justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures…**
> **As to the burden of proof in this sphere, the Court has established that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified….**
> **As regards the question of what constitutes prima facie evidence capable of shifting the burden of proof on to the respondent State, … there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. The Court adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake….**
> **Lastly, as noted in previous cases, the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases ….[T]here could be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.**

(§§175-181).

90. The Court also made it clear that statistics may be sufficient to establish a *prima facie* case of discrimination within Article 14. The effect, then, of the judgment in *DH* is that where there is statistical evidence showing that some protected groups are experiencing specific and serious forms of discrimination or disadvantage falling within the "ambit" of the other Convention rights, a State may be under a positive obligation to address it (unless it can show that the differences are as a result of objective factors unrelated to ethnic origin or that they are objectively justified) (*DH*; Opuz *v Turkey (App no 33401/02) judgment of the European Court of Human Rights on 9th June 2009*). This is of obvious relevance to the WRB and even the limited outcomes of the EIAs.

91. As to establishing *proportionality*, the ground of discrimination relied upon will be highly relevant. In some cases the Court will apply strict standards, in others a wide margin of appreciation is accorded to States. The case law from the ECtHR has identified a number of "suspect" classifications which require "very weighty reasons" to justify a difference in treatment. These are: race (e.g. *Timishev v. Russia*, (2007) 44 EHRR 37, §58); sex (e.g. *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, §78; *Van Raalte v Netherlands* (1997) 24 EHRR 503, §39);

religion (see, eg, *Hoffmann v Austria* (1993) 17 EHRR 293, §36); sexual orientation (e.g. *L & V v Austria* (2003) 36 EHRR 55, § 45; *Karner v Austria,* (2003) 38 EHRR 528, §37). Subject to those observations then, a difference in treatment will violate Article 14 if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. There has been little elaboration on this from the ECtHR but the principle is well understood and seen in EU law too and absent a proper consideration of the impact of the measures in the WRB, such will be difficult for the DWP to make out. The impact of international law described below will also be important in establishing violations of the Convention rights.

International Law: United Nations

92. International law will be highly material to the interpretation and application of domestic law. In particular, whilst the United Nations Treaties are not incorporated, their provisions will be material in interpreting domestic and ECHR and understanding public policy (Clayton & Tomlinson, *"The Law of Human Rights"*, §2.05 *et seq*). Further, customary international law too creates a free standing legal norm against racial discrimination which is likely to be relevant to certain of the measures in the WRB (*R (European Roma Rights Centre and others) v Immigration Officer at Prague Airport and another (United Nations High Commissioner for Refugees intervening)* [2005] 2 AC 1, §44).

93. The right to social security and the right to an adequate standard of living are both widely recognised in international human rights standards. For example, the Universal Declaration of Human Rights recognises the right to *"security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control"* (Article 22, see also Article 25). The UK is a party to the International Covenant on Economic Social and Cultural Rights (ICESCR), which similarly guarantees the right to an adequate standard of living and to social security. Article 11 ICESCR makes clear that circumstances where an individual is permitted to become destitute would be in breach of the right to an adequate standard of living, which includes *"adequate food, clothing and housing…and the continuous improvement of living conditions"* (see also, Article 9). The right to social security has been subsequently incorporated in a range of international human rights treaties, including in the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5(e)); Convention on the Elimination of All Forms of Discrimination against Women (Articles 11 and 14) and the Convention on the Rights of the Child (Article 26). In their recent General

Comment on the scope of this right, the UN Committee on Economic and Social Rights explained:

> **The right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realise their Covenant rights. To demonstrate compliance with their general and specific obligations, States parties must show that they have taken the necessary steps towards the realisation of the right to social security within their maximum resources, and have guaranteed that the right is enjoyed without discrimination and equally by men and women, different ethnic groups both in respect of adults and children. Violations include, for example, the adoption of deliberately retrogressive measures incompatible with the core obligations…the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to social security; active support for measures adopted by third parties which are inconsistent with the right to social security; the establishment of different eligibility conditions for social assistance benefits for disadvantaged individuals depending on the place of residence; active denial of the rights of women or particular individuals or groups. Violations through acts of omission can occur when the State party fails to take sufficient and appropriate action to realise the right to social security. In the context of social security, examples of such violations include the failure to take appropriate steps towards the full realisation of everyone's right to social security; the failure to enforce relevant laws or put into effect policies designed to implement the right to social security [...].The Covenant is clear that, although States are free to secure its minimum obligations through a variety of means, any failure to meet the minimum standards envisaged will be in violation of the international standards which the United Kingdom has accepted. The Government has recently stressed that it considers that the principle means of securing these rights in domestic law should be through legislation enacted by a democratically accountable Parliament. In our view, in ratifying the Covenant, the UK has made a commitment, binding in international law, to abide by the terms of the Covenant. This requires government, Parliament and the courts to make efforts to ensure the fullest possible compliance with the terms of the ICESCR.**

(General Comment No 19, The Right to Social Security, 4 February 2008, E/C.12/GC/19, §§1, 64-5).

94. These broad rights are subject to the principle of progressive realisation within available resources. The right must be secured without discrimination and the State must take deliberate, concrete and targeted steps towards their realisation. The UN Committee has explained that there is a strong presumption in the Convention that retrogressive measures taken in relation to the right to social security are prohibited (*ibid.* §42). This is obviously highly relevant to the measures in the WRB which are in large part regressive and may be especially difficult to justify for this reason.

95. As to the UN Convention on the Rights of Persons with Disabilities the purpose of the Convention is to *"promote, protect and ensure the full and equal enjoyment of all*

human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity" (Article 1). The general principles underpinning the Convention are described as *"respect for inherent dignity, individual autonomy including the freedom to make ones own choices, and independence of persons"* and the *"full and effective participation and inclusion in society" and "respect for difference and acceptance of disability as part of human diversity and humanity"* (Article 3). The Convention requires State parties to *"prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds"* and to *"take all appropriate steps to ensure that reasonable accommodation is provided"* (Article 5). It requires, inter alia, States to *"take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures……include the identification and elimination of obstacles and barriers to accessibility"* (Article 9). Further, the Convention guarantees a number of important and fundamental rights, including personal mobility (Article 20); respect for privacy, home and the family (Article 22-23); education (Article 24); health (Article 25); work and employment (Article 27); and an adequate standard of living and social protection (Article 28). In summary, the rights guaranteed pose three distinct duties on all States' parties, namely the obligation to respect the rights addressed by the Convention; the obligation to protect and prevent against violations of those rights by third parties and the obligation to fulfil the obligations imposed by the Convention by the taking of appropriate legislative, administrative, budgetary, judicial and other actions towards the full realisation of these rights (*"From Exclusion to Equality: Realising the Rights of Persons with Disabilities, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol"* (No.14, 2007) UN, p 20). These may be undermined by the WRB reforms, including, but not limited to, DLA.

96. As to children, the Convention on the Rights of the Child (CRC) includes (Article 26) *"the right [of every child]* to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law". Under the Convention a broad range of children's rights are recognised including the right to life (Article 6); the right to education

(Article 28)[52]; the right to protection from economic exploitation (Article 32)[53]; and the right to be free from torture or other cruel, inhuman or degrading treatment or punishment (Article 37), amongst others. Further, Article 2(1) provides that States Parties have a duty to respect and ensure the rights in the Convention to each child within their jurisdiction *"without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status"*. In addition, Article 2(2) provides that States Parties shall take all appropriate measures to ensure that children are protected *"against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members"*.[54] As to the CRC, the JCHR have observed:

> **The UN Committee recommended that the UK undertake "all the necessary measures to the 'maximum extent of available resources' to accelerate the elimination of child poverty". The Government's response accepts "that the levels of child poverty in the UK are unacceptable", and lists measures taken to "reverse the legacy we found when we came to office". ... The Government's commitment to tackling child poverty is well-known and often restated. As the UN Committee comments, it is likely to be poverty which most dramatically limits and compromises children's enjoyment of the rights set out in the Convention, and that is the wider context in which the Government's record in relation to the UNCRC should be assessed.**
> (p31, internal footnotes removed, *"The UN Convention on the Rights of the Child Tenth Report of Session 2002–03, JCHR*").

97. Again this is obviously highly relevant to the measures in the WRB which adversely impact on children and may be especially difficult to justify for this reason.

98. In addition to the measures above, there are general non-discrimination guarantees in all the main UN Conventions (see, eg, Article 26, ICCPR).

99. Each of the rights above are in jeopardy as a result of certain of the provisions of the WRB.

EU Law

100. EU law too provides now for fundamental rights including in the EU Charter on Fundamental Rights, which the Courts of Member States are obliged to give effect to,

[52] Article 28.
[53] Article 32.
[54] For a General Comment on The rights of children with disabilities under this Article, see No. 9 (2006) CRC/C/GC/9, http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.GC.9.doc.

the Charter now having the same legal value as the Treaties: Article 6(1) Treaty on European Union ("TEU"). Article 1 of the EU Charter on Fundamental Rights to protect individual "dignity" and with the right of the individual to respect for his physical and mental integrity (Article 3). Further, they must be interpreted and applied in a non-discriminatory way in accordance with the obligation under Article 20 of the EU Charter on Fundamental Rights to ensure equality before the law and the prohibition of discrimination in Article 21 of the EU Charter on Fundamental Rights, Article 2 and 3(3) of the TEU, Articles 8, 10 and 19 of the TFEU, Article 14, ECHR, which forms part of EC law: see Article 6(3) TEU. The provisions must be applied in a way that furthers the overriding objectives articulated in Articles 2 and 3(5) of the TEU, which provide as follows:

> **The Union is founded on values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.**

101. This too emphasises the fundamental nature of equality and dignity rights that might be undermined by the measures in the WRB.

Regulations

102. There are real concerns about the making of framework primary legislation which permits the making of detailed legislation by secondary legislation not subject to the same Parliamentary scrutiny. Such concerns have been raised about the Public Bodies Bill (http://www.equalityhumanrights.com/legal-and-policy/public-bodies-bill/) (and see above, §79).

103. The Bill of Rights 1689 is unlikely to tolerate any challenge to the Bill's formulation generally (and the Public Bodies Bill has other difficulties resulting from its form which are not applicable here). The fact that the detailed measures have not been formulated in the Bill, however, means that:

(a) There is difficulty in adequately giving effect to the Equality Duties;
(b) The s19 HRA statement is problematic.

104. These issues are addressed above.

Public Law

105. Many of the challenges reliant on the Equality Duties and HRA, with support from International law, might also be framed in other public law terms (*Wednesbury* unreasonableness) as alluded to above.

106. There are also possibly challenges available based on a failure to consult[55] on the EIAs (arising from the duty to act fairly and/or legitimate expectation) but further instructions on these matters would be required.

Conclusions

107. As set out above, there are a number of possible challenges available to the EHRC by way of judicial review based on the Equality Duties and the HRA and possibly some other public law grounds.

108. A challenge will no doubt be difficult because of the significant constitutional issues raised but is very important indeed for welfare reform and its impact on the most vulnerable and also for the way in which Government approaches legislative reform in the future.

109. Because of its importance, there is no doubt that if proceedings are to be pursued action must be taken **VERY URGENTLY** to ensure that they are not prejudiced. A letter before claim must be served with a very short turn around time and proceedings issued immediately thereafter.

G. Other Matters

Private Bodies

110. It appears that the Government anticipate much of the work necessary to implement the policies behind Universal Credit at least being undertaken by private bodies:

> **In order to provide local solutions to local labour market challenges, Jobcentre Plus will further empower its district managers. They will be given greater autonomy on how to allocate their resources and design their services, including a greater say in how they work with other local partners. The Government expects greater partnership working, so Local Authorities, charities and voluntary groups can work together with Jobcentre Plus managers.**
>
> (*Universal Credit: Welfare That Works* (2010, DWP) Cm 7957, §30).

---

55 *R v Brent London Borough Council, ex p Gunning (1985) 84 LGR 168 at 189*; *Secretary of State for Social Services, ex p AMA* [1986] 1 All ER 164, [1986] 1 WLR 1; *Re NUPE and COHSE's Application* [1989] IRLR 202; *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, § 112.

111. It is not at all clear that such bodies will be covered by the HRA in material respects and the EHRC may want to ensure that safeguards are formulated in law or policy to ensure that rights are not effectively lost by subcontracting out responsibilities for implementing the policies in the WRB.

112. I hope this is of assistance to my instructing solicitor and if I can be of any further help, I hope he will not hesitate in contacting me.

KARON MONAGHAN QC

04 April 2011